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IN THE  
**Supreme Court of the United States**

October Term, 1991

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,

*Petitioner,*

v.

METCALF & EDDY, INC.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIRST CIRCUIT

**SUPPLEMENTAL BRIEF IN OPPOSITION**

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INTRODUCTION

Pursuant to Supreme Court Rule 15.7, Metcalf & Eddy, Inc., respondent herein, submits this supplemental brief in opposition to apprise the Court of intervening matters not available at the time of respondent's last filing.

Three days after it filed its Reply Brief in this Court, the Puerto Rico Aqueduct and Sewer Authority ("PRASA"), petitioner herein, filed in the district court a motion to stay the district court proceedings pending disposition of its petition for a writ of certiorari. That timing is telling. Indeed, the motion to stay -- an obvious afterthought -- is yet another contradiction between PRASA's conduct and PRASA's contentions in this case.

PRASA has done more than simply let this case proceed to the eve of trial. While it argues to this Court that the Eleventh Amendment prevents it from even being haled into federal court, PRASA has instead chosen to litigate this case to the point of trial. In addition to the facts already noted, see Brief in Opp. 6, PRASA has noticed and taken additional depositions and, on the very day respondent's Brief in Opposition was being filed, PRASA itself filed three motions for summary judgment in the district court — all after filing its petition for certiorari and before filing its motion to stay. PRASA only sought its stay after M&E, in its Brief in Opposition, pointed out that the petition should be denied because PRASA has not done all it could have done to avoid the burdens of litigation. See id. at 12. PRASA has not defended its substantial participation in and initiation of pretrial proceedings in the district court or its undue delay in seeking a stay.

Although PRASA has persuaded a minority of States to file an amici brief in support of its petition, the States' brief does not reflect a full understanding of the facts of this case, PRASA's conduct in the last several months, or the applicable law. The States cite no cases but hypothesize that the First Circuit's decision raises the possibility that a State may be forced to stand trial while individual officials also named as defendants are dismissed. See Brief of Amici Curiae 6-7. This case, however, is not one where a State and its officials are defendants. The sole defendant in this case is PRASA, an autonomous public corporation whose claim to Eleventh Amendment immunity is at best extremely weak and whose claim to interlocutory review is disingenuous in light of its recent conduct. The broad issue the States would like to see addressed — whether the Eleventh Amendment permits a State to avoid all of the burdens of

litigation including pretrial discovery — is simply not present here because PRASA largely accepted those burdens by choosing to litigate rather than promptly seeking a stay or review from this Court. This Court is constitutionally constrained to the issues, facts, and parties actually present in this case.

This case is ready for trial. The First Circuit's ruling was correct and its judgment on the issue actually presented in this case is in harmony with the other circuits. See Brief in Opp. 7-10. PRASA is free to seek review on a "proper record" at the end of the case. See Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Auth., 945 F.2d 10, 14 n. 6 (1st Cir. 1991). Whatever disagreements there may be with the First Circuit's language, the result would not have been different in any other circuit. The broad issue the States and PRASA would like to see resolved must wait until a proper defendant fairly presents that issue. PRASA is not such a defendant and this Court should deny the petition for a writ of certiorari.

Dated: February 27, 1992 Respectfully submitted,

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